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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

IN RE: Bard IVC Filters) MDL No. 2:15-md-02641-DGC
Products Liability Litigation)

This Document Relates to:) NOTICE OF DEFENDANT
WAYNE RUDEN v. C.R. BARD, INC.,) CALIFORNIA PACIFIC MEDICAL
et al.) CENTER'S MOTION AND MOTION TO
DISMISS PLAINTIFF'S AMENDED
COMPLAINT UNDER FED.R.CIV.P.
12(b)(6) AND 12(e); OR IN THE
ALTERNATIVE FOR MOTION TO
REMAND UNDER 28 U.S.C. §
1447(c) AND FED.R.CIV.P.
12(b)(1) WITH SUPPORTING
MEMORANDUM; DECLARATION OF
HILARY E. YOUNGBLOOD

ORAL ARGUMENT REQUESTED

Honorable David G. Campbell



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STATUTES

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NOTICE OF MOTION TO DISMISS OR ALTERNATIVELY TO REMAND
TO ALL PARTIES AND TO THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that defendant Sutter West Bay Hospitals, doing business as California Pacific Medical Center ("CPMC"), will and hereby does move this Court for an Order granting its motion to dismiss the Second, Seventh, Eighth, and Ninth Causes of Action, along with Plaintiff's punitive damages claim, in Plaintiff's First Amended Complaint ("FAC"), pursuant to Federal Rule of Civil Procedure ("Rule") 12(b)(6).^{1/}

CPMC is a sham defendant. CPMC's motion to dismiss is therefore made on the ground that the Second, Seventh, Eighth, and Ninth claims fail to state a claim for relief "that is plausible on its face," as required under *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009), and that Plaintiff's claim for punitive damages is insufficiently pled, as follows:

1. Plaintiff's Second, Eighth, and Ninth Causes of Action fail since CPMC did not owe plaintiff a fiduciary duty.

2. Plaintiff's Ninth Cause of Action fails to allege any duty on the part of CPMC to recall the subject device.

3. Plaintiff's Seventh Cause of Action fails to allege any facts relating to breach of duty owed to Plaintiff by CPMC.

4. The gravamen of the FAC is in product liability, and California law does not recognize strict product liability

^{1/} This Court has vested authority to rule on this motion, which ruling shall be governed by California substantive law and federal procedural law. See *In re Donald J. Trump Sec. Litig.*, 7 F.3d 357 (3rd Cir. 1993) (cert. denied); *In re Prudential Ins. Co. of America Sales Practices Litig.*, 170 F.Supp.2d 1346 (Jud.Pan.Mult.Lit. 2001); *Sadler v. Pella Corp.*, 2015 WL 7454516 (D. South Carolina Nov. 23, 2015).

1 for providers of medical services such as CPMC.

2 5. CPMC was fraudulently misjoined in the case to
3 defeat diversity and federal jurisdiction.

4 6. Plaintiff's punitive damages claim fails under
5 California Code of Civil Procedure section 425.13 and Civil
6 Code section 3294(a) to plead facts to show CPMC's corporate
7 leaders' requisite intent by clear and convincing evidence.

8 Alternatively, CPMC moves for an Order granting its
9 motion for a more definite statement pursuant to Rule 12(e),
10 on the ground that the Second, Seventh, Eighth and Ninth Causes
11 of Action are so vague or ambiguous that CPMC cannot reasonably
12 respond: (1) Plaintiff's Second and Ninth Causes of Action fail
13 to identify the duty of care which CPMC allegedly breached; (2)
14 Plaintiff's Seventh Cause of Action is unintelligible as to who
15 made which alleged misrepresentations to whom; and (3)
16 Plaintiff's Eighth Cause of Action is nonsensical.

17 Alternatively, joined under Rule 12(g), CPMC will and
18 hereby does move for an Order dismissing and remanding this
19 action to state court pursuant to 28 U.S.C. § 1447(c) for lack
20 of subject-matter jurisdiction under Rule 12(b)(1).

21 CPMC's motion is based on this Notice and Motion, the
22 Memorandum and Declaration in support thereof, the complete
23 files and records in this action, and such other argument and
24 evidence presented at or before the hearing of this matter.

25 DATED: February 19, 2016. DAVIDOVITZ + BENNETT

26 By: /s/
27 HILARY E. YOUNGBLOOD
28 Attorneys for Defendant,
SUTTER WEST BAY HOSPITALS,
doing business as CALIFORNIA
PACIFIC MEDICAL CENTER

SUMMARY OF ARGUMENT

This is a products liability action against the defendant manufacturers of a medical device, and the hospital where it was placed, CPMC. However, Plaintiff's claims for negligence, negligent misrepresentation, breach of fiduciary duty, and prayer for punitive damages, fail to state a claim upon which relief can be granted as to defendant CPMC and should be dismissed without leave to amend.

First, CPMC should be dismissed under Federal Rule of Civil Procedure ("Rule") 12(b)(6), since Plaintiff cannot plead a viable claim against a hospital for negligence, negligent misrepresentation, or breach of fiduciary duty based on the hospital's alleged failure to advise Plaintiff of a product warning. Even if the alleged facts were true, CPMC did not owe fiduciary duty of care to Plaintiff. *Derrick v. Ontario Comty. Hospital*, 47 Cal.App.3d 145, 154 (1975).

Second, the gravamen of this action is products liability. California law does not recognize strict product liability for medical providers such as hospitals. *Silverhart v. Mount Zion Hospital*, 20 Cal.App.3d 1022 (1971).

Finally, Plaintiff's punitive damages claim should be dismissed pursuant to California Civil Code section 3294(a) and Civil Procedure section 425.13(a). At the least, CPMC seeks an Order for more definite statement under Rule 12(e).

Alternatively, CPMC seeks an Order dismissing the action under Rule 12(b)(1) for lack of subject matter jurisdiction, and remanding the action to state court pursuant to 28 U.S.C. § 1447(c).

I. INTRODUCTION

Initially, plaintiff filed this action in state court, but Bard defendants removed to the Northern District of California, and sought transfer to the Multidistrict Panel. Thereafter, on December 3, 2015, plaintiff filed a First Amended Complaint against California Pacific. See FAC, attached as Exhibit 1 to the Declaration of Hilary E. Youngblood in Support of CPMC's Motion.

On February 4, 2016, the United States Judicial Panel on Multidistrict Litigation entered its Conditional Transfer Order, thereby transferring this action to this Court. The Master Complaint does not apply to plaintiff's claims against CPMC. [Doc. 364.]

Plaintiff's claims against CPMC hinge on two theories: medical products liability, and negligent breach of fiduciary duty. Plaintiff's FAC fails to state any valid claim for relief as to CPMC, since under California law, hospitals are not subject to strict products liability, and CPMC did not owe Plaintiff a fiduciary duty. CPMC therefore cannot be liable to the Plaintiff for allegedly failing to inform Plaintiff of a 2010 FDA warning letter relating to the BRF. Further, CPMC did not negligently fail to recall Bard's device, since the hospital had no duty to do so.

Finally, Plaintiff seeks punitive damages against CPMC, without alleging any factual support in support of the request in direct contradiction to California law. His blanket allegation that all defendants' actions were "intentional, willful, knowing, fraudulent, malicious," and to "serve their

own pecuniary interests," if fatally deficient. [FAC at ¶¶ 135-141 (p.26-27).]

Given the foregoing, CPMC is fraudulently misjoined in this action and should be dismissed. Plaintiff, a California resident, alleges personal injury damages against defendants C.R. Bard, Inc., a New Jersey corporation, Bard Peripheral Vascular, Inc., an Arizona corporation, and CPMC, a California corporation. From the face of the FAC, it is clear that Plaintiff has named CPMC as a defendant for the sole purpose of defeating diversity.

The Court has jurisdiction to preside over this matter, and, therefore, to dismiss Plaintiff's claims against CPMC. *See e.g. Salkin v. United Services Auto. Ass'n.*, 767 F.Supp.2d 1062, 1069 (C.D. Cal. 2011). Accordingly, CPMC respectfully requests that the Court sustain its Rule 12 (b) (6) motion, and dismiss with prejudice the FAC as to CPMC.

However, if the Court finds that CPMC is not a sham defendant, then CPMC moves the Court for an Order granting its motion to remand on the basis that under Rule 12(b)(1) the Court lacks subject-matter jurisdiction.

II. FACTUAL BACKGROUND

In March 2004, Plaintiff was implanted with a Bard Recovery Filter ("BRF") at CPMC. Bard designed and manufactured the BRF.

Plaintiff's Second Cause of Action for negligence against CPMC, alleges that on August 9, 2010, the FDA issued a warning letter regarding the BRF, and "advised treaters, such as CPMC and its agents, to consider the risks and

1 benefits of filter removal for each patient." [FAC at 16:25-
2 26.] On "information and belief," Plaintiff claims that CPMC
3 received this warning, or negligently relied on Bard's
4 misrepresentations about the product, and negligently failed
5 to notify him. [FAC at 4:14-15, 16:27, 17:3-10.]

6 Plaintiff's Second Cause of Action for is based on his
7 claim that CPMC created a fiduciary duty through its agents,
8 who recommended and placed the BRF. These "agents" consisted
9 of "the physicians employed by and/or **associated** with CPMC,
10 including Dr Edwin Hassid, Dr. Sung Choi, Dr. William Kuo, Dr.
11 Bertrand Tuan, nursers, officers, directors, attendants and
12 other employees of CPMC that decided, directed and/or
13 performed the BRF procedure on Plaintiff." [FAC at 16:8-14
14 (emphasis added).]

15 Plaintiff's Seventh Cause of Action for negligent
16 misrepresentation is predicated entirely on CPMC's claimed
17 failure to "inquire as to [Bard's] misrepresentations." [FAC
18 at 22:7-8.] The FAC further alleges that the "Defendants'
19 intent and purpose in making these misrepresentations was to
20 deceive and defraud the public and the medical community..."
21 [FAC at 22:18-19], but it is unclear to which defendants
22 Plaintiff refers.

23 Plaintiff's Eighth Cause of Action for Breach of
24 Fiduciary Duty is based on the doctors' advice to place the
25 BRF in 2004 [FAC at 24:6-10], and the later failure to advise
26 Plaintiff of "adverse events." [FAC at 24:18-24.]

27 Plaintiff's Ninth Cause of Action is based on CPMC's
28 alleged breach of a duty to advise Plaintiff of the FDA

1 warning [FAC at 25:19-22] and to recall the BFR from the
2 market. [FAC at 25:25.]

3 Plaintiff seeks punitive damages, claiming that
4 defendants, "acted to serve their own pecuniary interests."
5 [FAC at 27:7.]

6 **III. LEGAL ANALYSIS**

7 **A. MOTION TO DISMISS UNDER RULE 12(b)(6) OR FOR A MORE** 8 **DEFINITE STATEMENT UNDER 12(e)**

9 **1. Legal Standard**

10 Under Rule 8(a)(2), a complaint must provide, "a short
11 and plain statement of the claim showing that the pleader is
12 entitled to relief, in order to 'give the defendant fair
13 notice of what the ... claim is and the grounds upon which it
14 rests." *Lewis v. Ollison*, 571 F.Supp.2d 1162, 1168 (C.D. Cal.
15 2008). A complaint must be dismissed under Rule 12(b)(6), when
16 a plaintiff's allegations fail "to state a claim upon which
17 relief can be granted." See *Ashcroft v. Iqbal*, 556 U.S. 662,
18 679 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570
19 (2007).

20 "While a complaint attacked by a Rule 12(b)(6) motion
21 to dismiss does not need detailed factual allegations, a
22 plaintiff's obligation to provide the 'grounds' of his
23 'entitle[ment] to relief' requires more than labels and
24 conclusions, and a formulaic recitation of the elements of a
25 cause of action will not do.' . . . Dismissal is appropriate
26 on a Rule 12(b)(6) motion if the facts alleged do not state a
27 claim to relief that is 'plausible on its face.' Dismissal
28 without leave to amend is appropriate when it is clear that

1 the deficiencies in the complaint could not possibly be cured
2 by amendment." *Lewis, supra*, 571 F.Supp.2d at 1168 (citations
3 omitted).

4 Conclusory allegations, such as "[o]n information and
5 belief, CPMC received [the FDA] warning" [FAC, at 16:27]
6 unsupported by proper factual allegations, do not meet the
7 requisite threshold to defeat a motion to dismiss." *Bell*
8 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("Factual
9 allegations must be enough to raise a right to relief above
10 the speculative level.")

11 Inconsistent factual allegations, such as "CPMC knew
12 the BRF was defective . . . or, in the alternative, BARD
13 concealed dangers known to BARD from CPMC" [FAC, at 3:19-21],
14 are grounds for dismissal of CPMC. Analogously, in *Baisden v.*
15 *Bayer Corp.*, 275 F.Supp.2d 759, 762-763 (S.D. W.Virginia,
16 2003), the court dismissed the defendant physician based on a
17 finding of fraudulent joinder:

18 [T]he impossibility of the claim against the non-
19 diverse defendant(s) is implicit in the contradictory
20 allegations: 1) defendant manufacturer hid the
21 information that 2) non-diverse doctor or pharmacist
22 knew or should have known. In each of these cases,
23 the premise of the case against the non-diverse
24 defendant(s) that they knew or should have known of
the dangers is undercut, defeated, and made
impossible by the claims of fraud and
misrepresentation against the manufacturers, who
allegedly prevented anyone from knowing the dangers.
That contradiction, apparent on the face of the
complaint, is also present here.

25 Rule 12(b)(6) also applies to strike punitive damages.
26 *Singleton v. Univ. of Cal.*, 1995 WL 16978, at *1 (N.D. Cal.
27 1995). Hence, joined with CPMC's motion to dismiss under Rule
28 12(b)(6) is a request for an Order striking Plaintiff's

1 punitive damages claim.

2 "[T]he judge may in his discretion, in response to a
3 motion for more definite statement under Rule 12(e), require
4 such detail as may be appropriate in the particular case."
5 *McHenry v. Renne*, 84 F.3d 1172, 1179 (9th Cir. 1996). In the
6 alternative, CPMC seeks an Order requiring a more definite
7 statement of Plaintiff's claims.

8
9 **2. The Second Cause of Action for Negligence Fails to
State a Claim Against CPMC and Is Uncertain**

10 The Second cause of action set forth in the FAC
11 attempts to plead the elements of negligence against CPMC
12 couched upon a breach of fiduciary duty. Plaintiff claims
13 CPMC, "created a fiduciary or special relationship with the
14 Plaintiff when they and their agents recommended and advised
15 the insertion of a BRF in Plaintiff, and when they and their
16 agents inserted a BRF in Plaintiff on or about March 2004."
17 [FAC at 16:8-11.] Plaintiff concludes that CPMC, "had an
18 ongoing duty to reasonably warn the Plaintiff of newly-
19 discovered risks related to this danger based on their
20 fiduciary and special relationship with the Plaintiff." [FAC
21 at 16:18-20.]

22 First, Plaintiff's negligence claim fails under
23 California law since it is established that a hospital does
24 not owe a fiduciary duty of care to patients. *Moore v. Regents*
25 *of Univ. of Cal.*, 51 Cal.3d 120, 133 (1990) (only defendant
26 physician and not hospital stood in fiduciary duty to
27 plaintiff in professional negligence and lack of informed
28 consent action). Plaintiff therefore cannot succeed in a cause

1 of action for negligence against CPMC on an alleged breach of
2 fiduciary duty theory.

3 The sole exception permitting breach of fiduciary duty
4 claims against a hospital requires, "a recognized theory of
5 secondary liability, such as respondeat superior." *Id.* The
6 doctors' "association with CPMC (the nature of which Plaintiff
7 is unaware) does not *de facto* create secondary liability.
8 California courts have held that non-employee doctors who are
9 associated with a hospital are not agents of the hospital, and
10 that the hospital has no liability for the acts of these
11 independent contractor doctors. *See Mayers v. Litow* (1957) 154
12 Cal.App.2d 413, 417-418.

13 Second, Plaintiff's negligence claim fails to state a
14 valid cause of action as to CPMC since the hospital had no
15 duty to inform Plaintiff of the FDA correspondence. Plaintiff
16 alleges that the FDA issued a warning letter in April 2010,
17 "advis[ing] treaters, such as CPMC and its agents, to consider
18 the risks and benefits of filter removal for each patient."
19 [FAC at 16:25-26.] Assuming for purposes of this motion that
20 CPMC received this letter, such a letter could not have
21 created a duty of care owed to Plaintiff by CPMC since, under
22 California law, a hospital has no "duty to advise a patient
23 . . . concerning the patient's condition when that duty might
24 substantially interfere with the relationship between the
25 patient and her attending physician." *Derrick v. Ontario*
26 *Community Hospital*, 47 Cal.App.3d 145, 154 (1975).

27 In *Derrick*, the court declined to impose on the
28 defendant *hospital* a duty to advise a patient that she had

1 contacted a contagious disease. Instead, the court imposed the
2 duty to warn the plaintiff on plaintiff's *physician*.
3 Therefore, any duty to warn Plaintiff belonged to his
4 physician(s), **not** CPMC. To the contrary, under *Derrick*, advice
5 from a hospital to a patient concerning risks of filter
6 removal may constitute interference with the physician-patient
7 relationship. Hence, Plaintiff's Second Cause of Action for
8 negligence fails to state a claim upon which relief can be
9 granted as to CPMC and should be dismissed. In the
10 alternative, the FAC should be amended to identify the duty
11 CPMC allegedly breached.

12 **3. The Seventh Cause of Action for Negligent**
13 **Misrepresentation Fails as to CPMC and Is**
14 **Uncertain**

15 Plaintiff's FAC fails to comply with the pleading
16 requirements of Rule 8(a)(2) and Rule 9(b). *See Houston v.*
17 *Medtronic, Inc.*, 957 F. Supp. 2d 1166, 1180 (C.D. Cal. 2013).
18 Instead, the FAC alleges that **Bard** provided "false or
19 incorrect information, or omitted or failed to disclose
20 material information." [FAC at 21:24.] To stretch this claim
21 to CPMC, Plaintiff alleges, "CPMC failed to properly screen or
22 inquire as to these misrepresentations and passed these
23 misrepresentations along to Plaintiff's health care
24 providers." [FAC at 22:7-9.]

25 Negligent misrepresentation requires proof that
26 defendant (1) made a false representation of material fact to
27 plaintiff, (2) without reasonable ground for believing it to
28 be true, (3) with the intent to deceive, (4) on which
plaintiff relied and (5) was therefore harmed. *West v.*

1 *JPMorgan Chase Bank, N.A.*, 214 Cal.App.4th 780, 792 (2013). In
2 California, negligent misrepresentation further differs from
3 intentional misrepresentation in that, while certain
4 nondisclosures may support a claim for intentional
5 misrepresentation, a negligent misrepresentation claim
6 requires a "positive assertion," and hence "omissions" or
7 nondisclosures cannot give rise to liability for negligent
8 misrepresentation. *Lopez v. Nissan N. Am., Inc.*, 201
9 Cal.App.4th 572, 596 (2011).

10 First, there is no legal support for Plaintiff's theory
11 that a hospital has an independent duty to verify information
12 medical product information provided by manufacturers. See
13 *Friedman v. Merck & Co.*, 107 Cal. App. 4th 454, 477 (2003) (to
14 state negligent misrepresentation, "plaintiff must allege
15 facts establishing that defendants owed him a duty to
16 communicate accurate information"); see also *Huntman v. Danek*
17 *Medical, Inc.*, No. 97-2155-IEG RBB, 1998 WL 663362, at *5
18 (S.D. Cal. Jul. 24, 1998).

19 Second, Plaintiff's FAC fails to satisfy at least two
20 of the five requisite elements for negligent
21 misrepresentation: CPMC did not make any representation to
22 Plaintiff; and to the extent the FAC contends that Plaintiff's
23 doctors, in their (untenable) capacity as CPMC's agents, made
24 such misrepresentations, their representations did not impose
25 a nonexistent duty on CPMC to verify the information provided
26 by Bard. [FAC at 22:7-12.] Also, Plaintiff has not alleged any
27 fact to support CPMC's or the doctors' intent to deceive the
28 Plaintiff. Accordingly, the Seventh cause of action should be

dismissed as to CPMC. At the least, Plaintiff should be ordered to amend the FAC to meet the heightened pleading requirements.

4. The Eighth Cause of Action for Breach of Fiduciary Duty Fails as to CPMC and Is Uncertain

The Eighth Cause of Action, for breach of fiduciary duty, suffers from the same deficiencies as the Second Cause of Action for Negligence, as both are improperly premised on CPMC's failure to advise the Plaintiff of the 2010 FDA warning. [FAC at 24:18-24.] As discussed above, this claim fails to allege a claim upon which relief can be granted: It is established that a hospital does not owe a fiduciary duty of care to patients; and it is established that a hospital may not interfere with the patient-physician relationship by giving treatment-related advice. See *Derrick, supra*, 47 Cal.App.3d at 154. Moreover, Plaintiff's bald allegation that CPMC received a warning from the FDA concerning the BRF is not at all factually supported, and his allegation that CPMC received warning information from Bard is contradicted by his allegation that Bard fraudulently withheld such information from the public. *Bell Atlantic, supra*, 550 U.S. at 555. Accordingly, this claim should be dismissed.

However, if the Court is not inclined to grant CPMC's motion to dismiss, CPMC requests that Plaintiff be ordered to amend the FAC to specify which duty of care CPMC violated.

5. The Ninth Cause of Action for Negligence-Recall/Retrofit Fails as to CPMC and Is Uncertain

Yet again, for the reasons stated above, the Ninth

1 Cause of Action lacks merit and is fatally uncertain, since it
2 relies on the claim that CPMC failed to advise plaintiff of
3 the FDA "warning letter" issued to treaters. [FAC at 25:17-
4 22.]

5 In addition, the Ninth Cause of Action is invalid since
6 it alleges that CPMC should "have recalled the BRF." [FAC, at
7 25:25.] There is no legal or factual basis to impose a duty to
8 recall the BRF on CPMC, a hospital that did not manufacture
9 the product. Conveniently, the FAC fails to address the issue
10 of duty as to CPMC. Such "vague, conclusory allegation avails
11 plaintiff nothing Mere general assertions by way of
12 conclusion or those indefinite in character, such as here
13 presented, cannot be deemed sufficient compliance with the
14 long-established rules of pleading." *Derrick, supra*, 47
15 Cal.App.3d at 153.

16 There is no common-law duty in California to recall a
17 medical device unless the FDA requires such recall. As the
18 California Supreme Court held in *Ramirez v. Plough, Inc.*, 6
19 Cal.4th 539, 556 (1993), unless a regulatory agency orders a
20 recall, there cannot be liability for failing to take that
21 action independently. Here, the FAC does not allege any recall
22 by the FDA. Hence, none of the defendants, let alone CPMC, had
23 any duty to recall the BRF.

24 Since the Ninth Cause of Action does not address the
25 issue of duty, it cannot properly plead breach of such
26 nonexistent duty. The Ninth Cause of Action therefore fails to
27 state facts sufficient to constitute any claim for relief
28 against CPMC.

6. **Plaintiff's Punitive Damages Claim Is Improper as to CPMC and Should Be Dismissed**

Plaintiff's punitive damages claim should be dismissed under Rule 12(b)(6) since it is legally invalid and factually devoid.

First, Plaintiff has failed to comply with California Code of Civil Procedure section 425.13, which requires that he first seek and obtain leave of Court before he may assert any claim for punitive damages against CPMC. Plaintiff has never sought or obtained such an order. [Youngblood Decl., ¶5.] Due to this failure, plaintiff is barred from seeking punitive damages against CPMC.^{2/}

Even ignoring this fatal failure under section 425.13, Plaintiff's FAC fails to meet the heightened pleading requirements to allege exemplary damages under California Civil Code section 3294(a). Instead, Plaintiff's claim is based solely on a conclusory allegation of fraud and malice on the part of the CPMC corporate entity, without any basis for such allegation. [FAC at pp. 26-27.]

Under California law, the "oppression, fraud, or malice" which is a prerequisite for exemplary damages must be plead by "clear and convincing evidence." Cal. Civ. Code § 3294(a). Specific facts must be pled to support such a finding, and a mere conclusory characterization of defendant's

^{2/} There is a conflict between the District Courts of the Ninth Circuit as to application of California Civil Procedure section 425.13 in Federal Court. See *Estate of Prasad v. County of Sutter*, 958 F.Supp.2d 1101, 1108-1121 (E.D. Cal. 2013).

1 conduct as intentionally fraudulent is patently insufficient.
2 *Brousseau v. Jarrett*, 73 Cal.App. 3d 864, 872 (1977). The
3 allegations must set forth facts demonstrating a willful and
4 conscious disregard of the rights and safety of others. *Taylor*
5 *v. Superior Court*, 24 Cal.3d 890, 894-895 (1979). Furthermore,
6 a request for punitive damages against a corporation must be
7 based on the malice of its officers, directors or managing
8 agents. Lack of such allegation is ground to strike a request
9 for punitive damages. *Xerox Corp. v. Far Western Graphics,*
10 *Inc.*, No. C-03-4059-JFPVT, 2004 WL 2271587, at *2 (N.D.Cal.
11 2004).

12 Here, the FAC fails to allege any specific facts to
13 support the allegation of fraud or malice as to CPMC, let
14 alone any support by clear and convincing evidence that the
15 intent of CPMC's managing officers was malicious. Therefore,
16 under Rule 12(b)(6), Plaintiff's punitive damages claim should
17 be dismissed without leave to amend.

18 **7. The Gravamen of the FAC Is Products Liability**

19 In the end, this is a product liability action against
20 a manufacturer based on the product's failed performance.
21 Under California law, a hospital may not be liable under a
22 product liability theory for a defective device such as the
23 BRF.

24 In *Silverhart v. Mount Zion Hospital*, 20 Cal.App.3d
25 1022 (1971), the plaintiff sought to apply the doctrine of
26 products liability to a hospital that furnished a defective
27 needle which caused her injury. Plaintiff's theory was that
28 the hospital was a "supplier" of the product and was therefore

1 subject to the same standard of liability as any other
2 supplier of products. The court soundly dismissed this
3 argument, noting that a hospital's business is to provide
4 medical services, not sell products. *Id.* at 1027.

5 The holding in *Silverhart* has been consistently
6 approved and relied on over the years. For example, in *Hector*
7 *v. Cedars-Sinai Medical Center*, 180 Cal.App.3d 493, 505
8 (1986), the court found that defendant Hospital could not be
9 found strictly liable for its provision of a defective
10 pacemaker to plaintiff, because the Hospital was more properly
11 viewed as a provider of medical services, and not as the
12 seller of the product. Similarly, in *Pierson v. Sharp Memorial*
13 *Hospital, Inc.*, 216 Cal.App.3d 340, 346-347 (1989), the
14 defendant hospital was absolved of liability for an allegedly
15 defective carpet, since the hospital was the provider of
16 medical services rather than a producer and marketer of
17 products.

18 Here, plaintiff cannot state facts sufficient to
19 constitute a claim for negligence under a theory of product
20 liability against defendant CPMC. CPMC's role was limited to
21 providing medical services to plaintiff. It did not
22 participate in the manufacture or retail of the BRF, nor does
23 plaintiff allege as much. CPMC therefore requests that the
24 Court dismiss plaintiff's FAC against CPMC, since the sole
25 nexus between plaintiff and CPMC is that the BRF was placed at
26 the Hospital, which is insufficient to attribute liability to
27 a Hospital for failure of a medical device.

28 //

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the date below, I electronically filed the foregoing NOTICE OF DEFENDANT CALIFORNIA PACIFIC MEDICAL CENTER'S MOTION AND MOTION TO DISMISS UNDER FED.R.CIV.P. 12(b)(6) AND 12(e); OR IN THE ALTERNATIVE FOR MOTION TO REMAND UNDER 28 U.S.C. § 1447(c) AND FED.R.CIV.P. 12(b)(1) WITH SUPPORTING MEMORANDUM; DECLARATION OF HILARY E. YOUNGBLOOD; and PROPOSED ORDER with the Clerk of the Court by using the CM/ECF system which will send notification of such filing to all counsel of record in this action.

Dated this 19th day of February, 2016.

s/ Hilary E. Youngblood
Davidovitz + Bennett
Attorneys for Defendant,
SUTTER WEST BAY HOSPITALS,
doing business as CALIFORNIA
PACIFIC MEDICAL CENTER

